

## **EXHIBIT 9**

# MILLER & COMPANY REPORTERS

**CONFIDENTIAL**  
**CERTIFIED COPY**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC.,	)	
Associational Plaintiff, BETTY	)	
MILES, JOSEPH GOULDEN, and JIM	)	
BOUTON, on behalf of themselves	)	
and all other similarly situated,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
vs.	)	05 CV 8136 (DC)
	)	
GOOGLE INC.,	)	
	)	
Defendant.	)	
-----	)	

HIGHLY CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

DEPOSITION OF: STEPHANE JASKIEWICZ

TAKEN ON: February 14, 2012

**NO.** **REPORTED BY:**

13044

BRENDA L. MARSHALL  
CSR No. 6939

Los Angeles

San Francisco

800.487.6278

1 Q. Director of engineering? Is that what  
2 you said?

3 A. Yeah. The exact title was Director of  
4 Product Development.

11:04:01 5 Q. When you joined Google, what position  
6 did you take in April 2007?

7 A. Program manager.

8 Q. And what were your -- how long did you  
9 hold that position?

11:04:14 10 A. It's not very clear. Things are often  
11 in a continuum. So I actually didn't act that  
12 much as a program manager, mostly as an  
13 engineering manager, which is what I'm doing  
14 today.

11:04:27 15 Q. Mostly as an engineering manager?

16 A. Yeah.

17 Q. So since about April 2007 till today,  
18 you've been an engineering manager, essentially,  
19 for Google, or acted in that capacity?

11:04:37 20 A. Yeah. It's a continuum. I started  
21 doing project management in the beginning and  
22 very quickly moved to more technical issues.

23 Q. Okay. And have you been assigned to  
24 Google Books for that entire period?

11:04:50 25 A. Yes.

1 scan center?

2 A. It is in the scan center, yes.

3 Q. And does your team write any software  
4 for the check-in station?

11:19:18 5 A. Yes.

6 Q. And what is the purpose of the check-in  
7 station?

8 A. There -- there are a few of them. The  
9 two main ones are I -- or I guess the main  
11:19:33 10 one -- because they all end up determining  
11 whether or not the book is fit to scan. I guess  
12 the other one is to register -- register the  
13 fact the book is in the scanning center so that  
14 we can track it later and inquire about its  
11:19:48 15 location in the scanning center.

16 Q. And when you say determine whether the  
17 book is fit to scan, how is that determined?

18 A. So one of the things is what you asked  
19 about, opt-outs, in determining whether or not  
11:20:03 20 the book is opted out. The others have to do  
21 with physical conditions of the book. We have  
22 different type of scanning stations for  
23 different type of material so they tell us which  
24 one is, like, the appropriate one.

11:20:17 25 They also check for the size of the

1 book, make sure that we can actually scan it.  
2 They check for the condition of the book. If  
3 it's too damaged, we won't scan it. And they  
4 check for specific conditions, like the text  
11:20:29 5 being too close to the gutter. If it is, then  
6 we won't scan it because we wouldn't be able to  
7 capture all the text.

8 Q. Too close to the what?

9 A. The gutter.

11:20:40 10 Q. The binding of the book?

11 A. Yeah. The binding of the book. Sorry.

12 Q. So the scan wouldn't end up being useful  
13 to view?

14 A. Correct.

11:20:49 15 Q. Do you have any responsibility for  
16 creating the opt-out list at Google?

17 A. No.

18 Q. Do you know who does?

19 A. So I don't know how to answer that  
11:21:05 20 question because Google doesn't decide what the  
21 opt-out list is. It's just publishers coming  
22 forward and telling us what the list should be  
23 of things we shouldn't scan.

24 Q. Right. But does someone have the  
11:21:18 25 responsibility for making sure that list is

## **EXHIBIT 10**

CONFIDENTIAL

\* \* \* C O N F I D E N T I A L \* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et )  
al., )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 05 Civ.  
 ) 8136 (DC)  
GOOGLE INC., )  
 )  
Defendant. )  
----- )

February 17, 2012

9:52 a.m.

Deposition of THOMAS TURVEY, held at  
the offices of Milberg, One Penn Plaza, New  
York, New York, before Laurie A. Collins, a  
Registered Professional Reporter and Notary  
Public of the State of New York.

Pages 57-61, 81-85, 88-92 and 102-05  
of the Deposition of Thomas Turvey will be filed under seal

1  
2 T H O M A S T U R V E Y ,

3 called as a witness, having been duly sworn  
4 by the notary public, was examined and  
5 testified as follows:

6 EXAMINATION BY

7 MS. ZACK:

8 Q. Good morning.

9 A. Good morning.

10 Q. Can you state your full name and  
11 address, please?

12 A. Sure. Thomas Turvey,

13 REDACTED

14 Q. And you work for Google?

15 A. I do.

16 Q. What is your position?

17 A. I am the director of strategic  
18 partnerships.

19 Q. How long have you had that particular  
20 position at Google, approximately?

21 A. Approximately three years.

22 Q. And when did you join Google?

23 A. February 2004.

24 Q. And when you first joined, what was  
25 your position?

1 Turvey - Confidential

2 happened.

3 Q. I'm expanding it out and saying aside  
4 from this particular meeting do you recall ever  
5 hearing from any publishers that they took the  
6 position that Google should get permission before  
7 scanning copyrighted materials?

8 A. I have heard that from publishers.

9 Q. Do you recall which publishers?

10 A. Not specifically.

11 Q. Have you heard that from my authors?

12 A. I have heard that from authors involved  
13 in this case that are named in this case.

14 Q. Which authors are you speaking of?

15 A. I'm speaking of Jim -- I'm sorry, I  
16 forgot the last name. You're not going to help me  
17 with that? Okay. Fine.

18 MS. DURIE: Sorry.

19 Q. Jim Boughton?

20 A. No, not Jim Boughton. Besides --

21 Q. Jim Glick?

22 A. Jim Glick, yes.

23 Q. All right. So you heard from Jim Glick  
24 that -- who is an author?

25 A. Yes.

1 Turvey - Confidential

2 Q. What did he say?

3 A. I don't remember specifically.

4 Q. Did he say to you that he thought  
5 Google should get permission before scanning in  
6 copyright materials?

7 A. It's possible he said that.

8 Q. There are persons -- rights holders who  
9 have said that to you; right?

10 A. It's possible, yeah.

11 Q. Well, what I'm saying is you may not  
12 recall specifically who said it, but you recall  
13 that rights holders have said that to you --  
14 correct? -- that they believe that Google should  
15 get permission before scanning in copyright  
16 materials; correct?

17 MS. DURIE: Objection, asked and  
18 answered.

19 You can answer.

20 A. As I stated, I have no specific  
21 recollection other than Jim Glick, but it's  
22 possible that was said to me.

23 Q. Do you have a general recollection that  
24 that was said to you?

25 MS. DURIE: Objection, asked and

1 Turvey - Confidential

2 answered.

3 A. I have nothing more to add.

4 Q. Well, there's a difference between  
5 saying it was possible and saying I have a general  
6 recollection that it was said to me but I can't  
7 identify precisely who said it.

8 What I'm trying to ascertain is if you  
9 agree that it was said to you; you just can't  
10 recall who said it.

11 MS. DURIE: Asked and answered.

12 You can answer.

13 A. I have nothing more to add.

14 Q. What was the reason that Google met  
15 with the AAP?

16 MS. DURIE: Objection, calls for  
17 speculation.

18 You can answer.

19 Q. To the extent you know.

20 A. Upon request.

21 Q. And prior to attending the meeting, did  
22 you get some sense of what the meeting was going  
23 to be about?

24 A. I was told it would be about the  
25 library project.

Turvey - Confidential

REDACTED

Q. Did you at any time get any data about whether after the "buy the book" link was clicked that books were actually purchased?

A. Not that I remember.

Q. Did you ever attempt to get that data?

A. I think we had a discussion or two.

Q. Was there some reason why you didn't get that done?

A. As I remember, no retailer was willing to provide that to us.

Q. Excuse me?

A. As I remember, no retailer was willing to provide that to us.

REDACTED

## **EXHIBIT 11**

ORIGINAL

Perle

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
Master File No.: 05 CV 8136-DC

THE AUTHORS GUILD, et. al.,  
Plaintiffs,  
vs.  
GOOGLE, INC.,  
Defendants.

\_\_\_\_\_ /

2500 South Ocean Boulevard  
Apartment 3A5  
Palm Beach, Florida  
Monday, 2:00-3:37 p.m.  
March 19, 2012

DEPOSITION OF E. GABRIEL PERLE

Taken on behalf of the Plaintiffs before Janet M.  
Willitz, RPR, RMR, Notary Public in and for the State of  
Florida at Large, pursuant to Plaintiffs' Notice of  
Taking Deposition in the above cause.

1 book publishing industry, is that correct?

2 A. Yes.

3 Q. Do you consider Google to be a part of the  
4 book publishing industry?

5 A. What a strange question. I mean, it's all a  
6 matter of definition. Certainly, Google is  
7 participating in the book publishing industry now, but  
8 it's not what I would consider to be a book publisher as  
9 such.

10 Q. And then the next sentence says: I have not  
11 been asked to and do not herein render any opinions  
12 regarding issues of substantive copyright law.

13 What do you mean by that?

14 A. Just what it says.

15 Q. What type of substantive issues are you not  
16 rendering opinions about?

17 A. Oh, what constitutes fair use would be the  
18 obvious one, but whether or not something is subject to  
19 libel or things of that nature.

20 Q. So you're not offering any opinions about fair  
21 use, right?

22 A. Correct.

23 Q. Are you offering any opinions about whether  
24 any particular authors are legal or beneficial owners?

25 A. No.

1 A. Yes.

2 Q. I'd like for you to look at paragraph 20 on  
3 page 5 of your declaration.

4 A. I've got it.

5 Q. And you write: Some publishing contracts  
6 provide for royalty-free promotional uses. Then you  
7 say: Under such contracts, the author has given up  
8 legal ownership of the copyright, but does not have the  
9 right to receive royalties for promotional uses.

10 A. Yes.

11 Q. What do you mean by legal ownership there?

12 A. Legal ownership.

13 Q. As opposed to what?

14 A. As opposed to just an interest.

15 Q. Well, are you making any judgments about that  
16 official ownership?

17 A. Not at this point, no.

18 Q. So you're not suggesting that an author who  
19 has given a publisher a royalty-free promotional right  
20 has given up its beneficial interest in the copyright,  
21 are you?

22 A. No.

23 Q. Now in paragraph 21, the first sentence says:  
24 Some contracts expressly prohibit royalty-free  
25 promotional use, comma, reserving all electronic

1           Q.    No royalties shall be payable on copies  
2   furnished gratis to the author or for review,  
3   advertising sample, sales promotion or like purposes or  
4   on copies destroyed by fire or other accident, but  
5   nothing in this clause shall be construed as exempting  
6   from royalty copies supplied by the publisher for resale  
7   in payment for trade advertising.

8                   Do you see that?

9           A.    Yes.

10          Q.    And you would agree that that is a promotional  
11   use clause, correct?

12                   MR. GRATZ:  Objection, vague.

13                   You can answer it.

14                   THE WITNESS:  Well, you can call it anything  
15   you want to.  You can call it macaroni, but, I  
16   mean, you're trying to characterize, by a label, a  
17   sentence which has clear meaning in the English  
18   language, and in the custom of the trade, people  
19   don't refer to clauses in contracts with labels  
20   that way.

21   BY MS. ZACK:

22          Q.    So is it correct that in your practice you  
23   have never heard the phrase promotional use?

24          A.    Of course, I've heard it.

25          Q.    So it's not a phrase that you're unfamiliar

1 with?

2 A. Wait a minute. Did you say promotional use  
3 clause?

4 Q. Yes.

5 A. No, I've heard the phrase promotional use, the  
6 term promotional use clause.

7 Q. So you've heard the term promotional use.

8 MR. GRATZ: I'm not sure that the witness was  
9 finished with his answer.

10 MS. ZACK: Oh, I'm sorry, I thought he was.

11 THE WITNESS: Now I am because I don't  
12 remember where I was.

13 MS. ZACK: The reporter can read it back to  
14 you.

15 (Thereupon, the portion referred to was read  
16 by the reporter as above recorded.)

17 THE WITNESS: Okay.

18 BY MS. ZACK:

19 Q. And so in your trade usage, you've heard the  
20 phrase promotional use?

21 A. Yes.

22 Q. And you've seen promotional use provisions in  
23 contracts?

24 A. Of course.

25 Q. But you don't like clause? You don't like

1 that word, that phrase?

2 A. You're asking me if that is the customary  
3 language.

4 Q. No, sir, I'm not asking you whether it's  
5 customary or not; I'm just asking you whether, in this  
6 particular contract, you would consider it a promotional  
7 use provision.

8 A. Of course.

9 Q. And in trade custom and usage, what is the  
10 promotional use?

11 A. How long is a piece of string? I can't answer  
12 that question.

13 Q. Well, I mean, what are the reasons why  
14 promotional use provisions are included in these  
15 contracts?

16 A. So that the publisher can authorize  
17 promotional use of excerpts to benefit the sale of a  
18 book.

19 Q. Right. And also so the publisher can  
20 distribute the book for reviews?

21 A. Oh, sure.

22 Q. What other types of uses or what other types  
23 of promotional purposes are there?

24 A. That's almost impossible to answer. As many

25 ---

1 Q. You gave an example of excerpts, and that  
2 would be excerpts for what? What type of excerpts would  
3 you -- You started practicing in the '50s and '60s,  
4 right?

5 MR. GRATZ: Objection. So the question is:  
6 You started practicing in the '50s or '60s?

7 MS. ZACK: Yes.

8 THE WITNESS: Yes.

9 BY MS. ZACK:

10 Q. And at that time, there were no electronic  
11 rights, right?

12 A. Wrong.

13 Q. Well, what electronic rights were there at  
14 that time?

15 A. All kinds of mechanical recording rights and  
16 transmission rights.

17 Q. So with respect to the mechanical recording  
18 and transmission rights, were there promotional uses  
19 with respect to those rights?

20 MR. GRATZ: Objection, vague as to time.

21 MS. ZACK: That's fine, I'm talking about back  
22 in the '50s and '60s.

23 MR. GRATZ: That's still vague.

24 BY MS. ZACK:

25 Q. Did you, as a matter of custom and trade

1 practice, when you were a publisher, use microfiche or  
2 microfilm for promotional uses?

3 A. No.

4 Q. What types of outlets did you typically use in  
5 the '50s and '60s for promotional uses?

6 A. Trade advertising, newspaper advertising, The  
7 Sunday Times Book Review, Publishers Weekly. Things of  
8 that nature.

9 Q. And that would include excerpts, right?

10 A. Sure, it could.

11 Q. And sometimes you would give away the whole  
12 book so it could be reviewed, right?

13 A. Right.

14 Q. And you used excerpts for advertising,  
15 correct?

16 A. Correct.

17 Q. And so, I mean, this has been a longstanding  
18 practice in the publishing industry, correct?

19 A. What has?

20 Q. To have provisions in contracts for  
21 promotional uses.

22 A. Yes, historically, publishing contracts  
23 provide for promotional uses of all or part.

24 Q. Right, and typically they're royalty-free  
25 because neither the publisher nor the author is getting

1 any compensation, correct?

2 A. Correct.

3 Q. And that's what my point is. That's not  
4 something new that just developed in the last ten years;  
5 that's been going on for fifty years, right?

6 A. In a different context, yes.

7 Q. Now referring back to the contract that we  
8 were looking at, which was, I believe, 60-G, correct?

9 A. Correct.

10 Q. Referring you back to the paragraph note that  
11 we looked at a little bit before which says: No royalty  
12 shall be payable on copies furnished gratis to the  
13 author or for review, advertising sample, sales  
14 promotion or like purposes.

15 A. What paragraph is that?

16 Q. It's on AG100060, and it's a paragraph that  
17 looks like to me that it has got a (k) in it.

18 A. I've got it.

19 Q. But it says: No royalty, et cetera. Do you  
20 see that?

21 A. Yes.

22 Q. That's a promotion clause, correct, or a  
23 provision of this contract?

24 MR. GRATZ: Objection, vague. Asked and  
25 answered.

1 MS. ZACK: Well, I really can't remember  
2 whether it has been asked and answered. I thought  
3 he said: I could call it macaroni. I'm just  
4 trying to get a straight answer here.

5 BY MS. ZACK:

6 Q. You would agree with me, Mr. Perle, that this  
7 is a promotion clause, correct?

8 MR. GRATZ: Objection, vague. Asked and  
9 answered.

10 You can answer it if you understand the  
11 question.

12 THE WITNESS: Well, you can call it whatever  
13 you want to call it. It covers -- Repeat your  
14 question.

15 BY MS. ZACK:

16 Q. What does it cover?

17 A. Repeat your question.

18 Q. My question was: Would you call it a  
19 promotion? Do you think it covers promotional uses?

20 A. It covers promotional uses, yes.

21 Q. All right.

22 A. It covers promotional royalties on promotional  
23 uses.

24 Q. And it says: There will be no royalties,  
25 right?

Perle

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1 A. Correct.

2 Q. As was standard --

3 MR. GRATZ: Objection.

4 BY MS. ZACK:

5 Q. -- in the publishing procedure, correct?

6 MR. GRATZ: Objection. Vague as to the time.

7 BY MS. ZACK:

8 Q. Well, did that ever change in your experience?

9 A. Did what ever change?

10 Q. Was there a time when it was typical to give  
11 royalties for promotional uses, and then it changed?

12 A. No.

13 Q. So it has pretty much been the same for all  
14 your fifty years of practice, right?

15 MR. GRATZ: Objection, vague in its use of  
16 promotional uses.

17 You can answer it if you understand the  
18 question.

19 THE WITNESS: Repeat the question.

20 BY MS. ZACK:

21 Q. My question was whether -- Well, never mind.  
22 I'm going to withdraw it. It's not necessary at this  
23 point.

24 Let's now look at 60-J.

25 A. I have it.

1 Q. Now with respect to all of these contracts, PX  
2 60-A through the last one, which I guess is 60-Y, in  
3 each of these contracts, there were royalty clauses,  
4 correct?

5 A. Correct.

6 Q. Is that typical in your experience in the book  
7 publishing industry?

8 A. For a book publishing contract to provide for  
9 royalties? Yes.

10 Q. Have you personally ever registered a  
11 copyright?

12 A. What do you mean by registered a copyright? I  
13 have ---

14 Q. Not for yourself, but for Time, Inc.?

15 A. No, I had associates, lawyers and clerks to  
16 take care of the clerical functions, and registration  
17 was one of those.

18 Q. Did you have a practice as to whether or not  
19 you attempted to register within ninety days of  
20 publication when you were at Time, Inc.?

21 A. I gave orders that all books that were  
22 published should have a registration filed within that  
23 period of time.

24 Q. Which is ninety days of the first publication?

25 A. Yes.

1 Q. So you gave those orders to the persons  
2 working for you?

3 A. Yes.

4 Q. And was that because you wanted to have the  
5 right to recover statutory damages in the event of an  
6 infringement?

7 MR. GRATZ: Objection, vague as to time.

8 BY MS. ZACK:

9 Q. When you gave those orders, was that the  
10 reason for the orders because you wanted to have the  
11 right to recover statutory damages for infringement?

12 MR. GRATZ: Same objection.

13 THE WITNESS: That was part of the reason, and  
14 it's also the time provided in this statute.

15 BY MS. ZACK:

16 Q. Have you ever in your practice attempted to  
17 determine whether a book was registered, whether the  
18 copyright for a book was registered?

19 A. Yes.

20 Q. Have you been able to do that?

21 A. Yes.

22 Q. How do you do that?

23 A. I have somebody in my office that works for me  
24 do it.

25 Q. Do you know what steps they take?

1 A. No.

2 Q. Were people in your office typically able to  
3 determine that information for you?

4 A. They would, yes.

5 Q. And did you sometimes ask people working for  
6 you to determine whether a copyright in a particular  
7 book had been registered within ninety days?

8 A. Repeat that.

9 Q. Did you sometimes, in your work, ask those who  
10 reported to you, to check to see, with respect to  
11 certain books, whether their copyright had, in fact,  
12 been registered within ninety days?

13 A. Probably, but I don't remember any specific  
14 instances.

15 Q. You don't recall having any problems in making  
16 determinations as to the registration status of books?

17 A. No.

18 Q. And you would agree that if an author has the  
19 royalty right under a contract, even if the contract is  
20 not reverted, the author is the beneficial owner,  
21 correct?

22 MR. GRATZ: Objection. Calls for a legal  
23 conclusion.

24 You can answer it.

25 THE WITNESS: No, I have no answer to that.

1 the copyright office or something like that?

2 A. No, no. It's just that there is no office  
3 that I know of where such requests are collected and  
4 archived. I don't know what the copyright office is  
5 doing.

6 Q. And then 19 says: Some offices do not  
7 maintain records of where the rights have reverted.

8 A. Correct.

9 Q. What is your basis for that?

10 A. Instances that I know of.

11 Q. Is it also true that some publishers do not  
12 maintain records of where the rights have reverted?

13 A. I don't know the answer to that.

14 Q. All right. How many hours have you worked in  
15 this matter, Mr. Perle?

16 A. I honestly don't know.

17 Q. Just approximately?

18 A. Twenty. That's a rough guess.

19 Q. I understand. Do you have any knowledge about  
20 what purposes Google is using your declaration for?

21 A. Repeat that.

22 Q. Do you know why you have been asked to give  
23 these opinions?

24 A. No.

25 Q. Have you read Google's brief?

Perle

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1 A. Yes. Oh, no, no, not the brief.

2 Q. And you haven't read Google's brief in which  
3 your declaration is cited?

4 A. No.

5 Q. So obviously, you can't say whether you agree  
6 or disagree with the use that Google is making of your  
7 opinion?

8 A. You are correct.

9 Q. We're almost done.

10 A. All right.

11 Q. Can we look at a couple more contracts? If  
12 you would, please look at PX 60-V.

13 MR. GRATZ: Is that G as in golf?

14 MS. ZACK: No, I'm sorry, it's V as in Victor.

15 MR. GRATZ: V as in Victor? New American  
16 Library?

17 MS. ZACK: No.

18 THE WITNESS: I've got it.

19 MS. ZACK: I think it's Chronicle Books.

20 MR. GRATZ: Oh, I'm sorry, the U and the V  
21 look very similar.

22 MS. ZACK: Yes, they do look alike.

23 BY MS. ZACK:

24 Q. It's Chronicle Books, and it's AG100192 is the  
25 first Bates number.

## **EXHIBIT 12**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, et )  
al., )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 05 Civ.  
 ) 8136 (DC)  
GOOGLE INC., )  
 )  
Defendant. )  
----- )

March 22, 2012  
12:50 p.m.

Deposition of HAL PORET, held at the  
offices of Milberg, One Penn Plaza, New York,  
New York, before Laurie A. Collins, a  
Registered Professional Reporter and Notary  
Public of the State of New York.

1 Poret

2 Q. Why? What was the purpose of looking  
3 at it?

4 A. Just to generally learn about the case.

5 Q. And did you make use of any information  
6 from that complaint in designing your survey?

7 A. Yes.

8 Q. What information?

9 A. Basically how the plaintiffs described  
10 the issues and what the case was about.

11 Q. Then number 2 you say you reviewed the  
12 following materials: Gale Contemporary Authors  
13 data. Which particular Gale Contemporary Authors  
14 data did you review?

15 A. The database that was the list of  
16 authors that the survey was done from.

17 Q. That's in that?

18 MS. DURIE: I was going to say, Joanne,  
19 you had asked to receive a copy of it, and I  
20 have a copy of it (handing).

21 MS. ZACK: Okay. Thanks.

22 Q. Now, in your report you say that Gale  
23 has, I don't know, 600 databases or something; is  
24 that right?

25 A. Yes.

1 Poret

2 Q. How did you pick the one you used?

3 A. Gale maintains a number of different  
4 databases that are different subject matter or  
5 purposes, and this was their database which is a  
6 reference work that consists of authors. So this  
7 was -- since the purpose was to interview authors,  
8 that was the relevant database.

9 Q. And did Gale have any other databases  
10 with authors included?

11 A. I don't know if they have any others.  
12 My understanding was this was the most  
13 comprehensive attempt to keep track of published  
14 authors that they have.

15 Q. Did you talk to somebody from Gale?

16 A. No.

17 Q. How did you choose this particular  
18 database, or did someone else choose it?

19 A. The attorneys from Durie Tangri gave me  
20 this database.

21 Q. So you did not choose the database;  
22 that was done by Durie Tangri?

23 A. Well, I wouldn't say I didn't choose  
24 it. When I was called about the case, we -- I  
25 discussed with them the need to have a way to get

1 Poret

2 through to the right types of respondents and that  
3 I would need some way -- some way to get through  
4 to authors. And they told me that they had access  
5 to this database. And so we discussed whether  
6 that would be suitable for the survey, and I  
7 decided that I felt that it would be. So I --

8 Q. Did you investigate whether there are  
9 other databases with authors information  
10 available?

11 A. Yes.

12 Q. And you found no other databases?

13 A. I didn't -- I didn't find -- I wouldn't  
14 say that, but when I searched around I didn't find  
15 any leads on anything that I thought would be more  
16 suitable than this or any reason to think this  
17 wouldn't be suitable.

18 Q. Well, what was the target population  
19 for your survey?

20 A. In a broad sense it was authors -- it  
21 was published authors, and in a more narrow sense  
22 I understood the class to be limited to authors  
23 who I believe have had a copyright registration  
24 filed within three months of the book being  
25 published, maybe.

1 Poret

2 So -- so that would have been the  
3 narrower definition of the universe that I was  
4 going for.

5 Q. So the universe you were attempting to  
6 locate was published authors that had a copyright  
7 registration filed within three months?

8 A. Well, I was attempting to get published  
9 authors in general but find out whether they had  
10 had a copyright registration filed within that  
11 period so as to determine whether they met that  
12 definition of the class, if that's what the  
13 definition was going to be.

14 Q. And what did you do to attempt to find  
15 those people who had copyrights registered within  
16 three months?

17 A. Just ask questions as part of the  
18 survey to determine, once we've reached somebody,  
19 did they fall into that description of the class.

20 Q. Did Google provide you with any data  
21 concerning books that were actually copied by them  
22 in their library project?

23 A. No.

24 Q. Did you ask for that data?

25 A. No.

1 Poret

2 have them? You don't have it on a respondent-by-  
3 respondent basis?

4 A. This is a respondent-by-respondent  
5 basis.

6 Q. I'm just asking you if this is the only  
7 format in which this information exists.

8 A. It exists in an Excel spreadsheet, and  
9 this is the Excel spreadsheet printed out.

10 Q. And there's nothing else that you have  
11 concerning the -- no other format in which the  
12 data exists other than the Excel spreadsheet?

13 A. I can't think of what it would be.  
14 This is literally every response of every  
15 respondent.

16 Q. Okay. I'm just trying to ascertain if  
17 there's anything else. You're telling me there  
18 isn't.

19 A. No.

20 MS. ZACK: Let's mark as the next  
21 exhibit, 76, Reference Manual on Scientific  
22 Evidence, second edition, Federal Judicial  
23 Center 2000.

24 (Plaintiffs' Exhibit 76, Reference  
25 Manual on Scientific Evidence, marked for

1 Poret

2 identification.)

3 Q. Have you seen this before?

4 A. Yes.

5 Q. Do you use this in connection with your  
6 surveys?

7 A. I'm familiar with it. I don't use it  
8 in the sense that I consult it as I'm doing a  
9 survey. But I'm familiar with the general  
10 principles that are discussed within it.

11 Q. And do you try to follow the principles  
12 discussed in it?

13 A. Yes.

14 Q. Are there any principles discussed in  
15 it that you disagree with?

16 MS. DURIE: It's overbroad.

17 But you can answer.

18 Q. That you can tell me.

19 A. There are some things discussed in this  
20 which are out of date. There are some things that  
21 are discussed in this which I wouldn't put it  
22 quite the same way as Dr. Diamond, so perhaps a  
23 moderate disagreement.

24 She is also in the process of redoing  
25 it right now, but for the most part these are

1 Poret

2 pretty accepted principles on a general basis.

3 Q. Well, are there any generally accepted  
4 survey principles that you do consider to be  
5 authoritative?

6 MS. DURIE: It's vague.

7 You can answer.

8 A. A lot of what's in here I consider to  
9 be generally authoritative. It's just extremely  
10 generally. And in designing a survey, general  
11 statements of survey principles aren't all that  
12 helpful. It's a matter of implementing them  
13 specifically for the circumstances of any given  
14 survey.

15 Q. Other than this particular document  
16 that we've marked as PX 76, are there other  
17 treatises or articles or books that you consider  
18 authoritative with respect to designing surveys?

19 A. There are others that have some  
20 guidance that I would look to at various times.

21 Q. What are they?

22 A. Well, for trademark matters, the  
23 McCarthy on Trademark Treatise is certainly  
24 considered authoritative or useful on certain  
25 topics. On occasion I've read law review articles

1 Poret

2 or articles in other publications.

3 But there's nothing that I would single  
4 out as an authoritative treatise.

5 Q. Can you name any others that you use  
6 other than McCarthy on Trademark and PX 76?

7 A. I wouldn't say that I use. I've seen  
8 other works at various times. There's some book  
9 by Phyllis Welter that I've seen before.

10 Q. In connection with doing your surveys,  
11 do you consult PX 76?

12 A. Only if there's some specific topic  
13 that I have reason to think this is going to have  
14 some specific guidance on. But in general I would  
15 not go to consult it. It's something that is in  
16 the background of my knowledge and understanding.  
17 But it's not a handbook that I can go to to help  
18 me in any specific survey, really.

19 Q. What about McCarthy on Trademark? When  
20 you are doing trademark-related surveys, do you  
21 consult McCarthy on Trademark?

22 A. Again, not unless I happen to think  
23 there's something very specific in there that  
24 would be useful.

25 Q. You just follow your own guidelines?

1 Poret

2 MS. DURIE: Objection, argumentative,  
3 and it mischaracterizes the witness's  
4 testimony.

5 Q. For surveys.

6 A. No. It's just that a lot of these  
7 things that you would call authorities or general  
8 guidelines are -- come from many different sources  
9 over many years; and they become part of your  
10 basic knowledge and experience, and you don't need  
11 to consult them on a project-by-project basis as  
12 if they are handbooks for how to do something  
13 specific.

14 Q. What are the guidelines that you follow  
15 in designing surveys?

16 A. I don't know that I can answer such a  
17 general question. There are many different --

18 Q. There must be some big-picture  
19 guidelines that you use when you design surveys;  
20 right?

21 A. Yes.

22 Q. Can you tell me what they are?

23 A. I can tell you some of them.

24 Attempting to get through to a relevant universe  
25 is certainly one. Attempting to write questions

1 Poret

2 that are clear and understandable and don't bias  
3 the results, interpreting data properly and  
4 reporting it properly.

5 Those are some of the big ones that  
6 come to mind.

7 Q. Anything else?

8 A. There are countless other things that  
9 would come to mind as principles if I was working  
10 through the issues of a specific survey, but it's  
11 hard to just name them all in the abstract.

12 Q. Do you know how many Google has copied  
13 in its library project?

14 A. No.

15 Q. Do you have any idea at all?

16 A. No.

17 Q. Do you know whether it's 100,000 or 100  
18 million or 10 million?

19 A. I don't know.

20 Q. Is that relevant?

21 A. To the -- not to --

22 Q. To the survey.

23 A. No.

24 Q. Do you know how many authors' books  
25 have been copied by Google in the library project?

1 Poret

2 A. No.

3 Q. Do you have any ballpark as to whether  
4 it's 100,000 authors, 2 million authors, 880  
5 authors?

6 A. No. I assume it's far less than 2  
7 million, because I don't think there are that many  
8 published authors, but I don't -- I couldn't give  
9 you a specific estimate.

10 Q. Did you ask Google if they knew?

11 A. No.

12 Q. You don't think that's relevant?

13 A. I don't see how that's relevant to what  
14 the survey was trying to measure.

15 Q. And the survey was trying to measure  
16 what?

17 A. It was trying to determine whether a  
18 published author -- what their attitude was toward  
19 the specific issue of having their books scanned  
20 so that for the specific purpose of the snippets,  
21 these short excerpts being findable and displayed  
22 in search results, and that pertains both to  
23 somebody whose books have been scanned and are  
24 available on Google Books and authors who that has  
25 not happened with.

1 Poret

2 but I just don't know if that is part of this  
3 program you're describing as opposed to some other  
4 program.

5 Q. And do you know whether those sales are  
6 by permission of the author or publisher?

7 A. I don't know.

8 Q. Now, on the bottom of the page -- the  
9 last paragraph on page 1, second sentence, you  
10 say, The purpose of the survey was to determine  
11 the extent to which members of the proposed class  
12 object to Google's scanning of books and display  
13 of short excerpts in Google Books search results  
14 and the extent to which they believe they have  
15 been negatively impacted by these actions.

16 Right?

17 A. Yes.

18 Q. So that was the purpose of the survey?

19 A. Yes.

20 Q. So the survey's purpose was not to  
21 determine whether authors objected to Google's  
22 scanning of books without permission?

23 A. It was. That was the purpose.

24 Q. It was the purpose to determine if  
25 authors objected to Google scanning without

1 Poret

2 permission?

3 A. Yes.

4 Q. So why doesn't the survey disclose  
5 anywhere within its terms that the scanning was  
6 without permission?

7 A. It is intended to do that.

8 Q. Well, where does it do that?

9 A. It lays out two different things that  
10 can happen in Google Books. It says that short --  
11 that short excerpts -- that Google scans books and  
12 provides short excerpts or, with permission,  
13 fuller or longer portions are available. And that  
14 is -- that is conveying that one form is with  
15 permission and one is without.

16 Q. Let's look at what we've marked as  
17 PX 64, which is Appendix B, which is the survey  
18 itself; correct?

19 A. Yes.

20 Q. If you go to -- for some reason these  
21 pages are not numbered at the bottom, but at the  
22 top it says page 5 of 8. Do you see that?

23 A. Yes.

24 Q. Then there's a question or I guess this  
25 is 220, which is when you explained to the

1 Poret

2 respondents about Google Books; right?

3 A. Yes.

4 Q. It says, As you may or may not know,  
5 Google scans books so that their content can be  
6 searched online and results displayed in Google  
7 Books. We'd like to ask your opinion about one  
8 particular aspect of Google Books.

9 For some books short excerpts of a  
10 book, about one-eighth of a page each, are  
11 viewable in Google Books search results. A user  
12 who performs a search can see up to three short  
13 excerpts of the book containing the relevant  
14 search terms.

15 A user can also click on a link to find  
16 the book in a bookstore or library. The scanning  
17 of books and displaying of short excerpts and  
18 search results is what we would like to ask you  
19 about.

20 Where does it say that this scanning is  
21 without permission?

22 A. Because the next thing it says is for  
23 some other books the full book or longer portions  
24 are available with special permission from the  
25 publisher or author.

1 Poret

2 Q. Well, Mr. --

3 MS. DURIE: Wait, wait. Let him finish  
4 his answer.

5 Q. Go ahead. Finish.

6 A. The flow of this is here's one thing  
7 that happens and here's the others thing that  
8 happens, and the second thing is saying this is  
9 what happens when there is permission.

10 Q. Yeah, let's talk about that. So in the  
11 first flow, which is 220, you say for some books  
12 short excerpts of the book, about one-eighth of  
13 the page, are viewable in Google Books search  
14 results.

15 Nowhere do you use the term -- the  
16 phrase "without permission"; correct?

17 A. Not in those words that you just read.

18 Q. Well, those are two pretty simple  
19 words, "without permission"; right?

20 MS. DURIE: Objection, argumentative.

21 Q. What would have been so hard to say, As  
22 you may or may not know, Google scans books  
23 without permission so that their content can be  
24 searched online and displayed in Google Books?

25 MS. DURIE: Objection, argumentative.

1 Poret

2 A. I never said anything would be hard  
3 about saying that. I'm just saying I wrote it in  
4 a way that conveys clearly that one version is  
5 without permission and one is. And I think it's  
6 perfectly clear.

7 Q. So you don't think it would have been a  
8 little bit more clear if you had added the words  
9 "without permission" after "Google scans books"?  
10 You don't think that would have been slightly more  
11 clear?

12 A. No, I don't think it would have been  
13 more clear. I think it's as clear as it can be.

14 Q. Oh, you think it's as clear as it can  
15 be?

16 A. Yes, and partly --

17 MS. DURIE: Wait, wait. If you asked a  
18 question, please let the witness answer it.

19 MS. ZACK: The question calls for a  
20 "yes" or "no" answer.

21 MS. DURIE: He does not have to answer  
22 the question "yes" or "no," and you shouldn't  
23 interrupt his answers.

24 A. The only thing I'm adding that goes  
25 into this, you have to realize the question do you

1 Poret

2 approve of or object to Google doing something in  
3 and of itself makes no sense as a question if it's  
4 suggesting that it's done with your permission.

5 It makes no sense to somebody to say do you object  
6 to something that you have given permission for.  
7 It's an illogical question.

8 So even -- it makes no sense to  
9 interpret it that way even if there was no  
10 explanation at all. So the explanation that is  
11 given here I think is clear without being leading  
12 in one direction or the other.

13 Q. Did you have any discussions with  
14 anyone about whether you should include the words  
15 "without permission" after "Google scans books"?

16 A. Not that I recall.

17 Q. So you just unilaterally decided that  
18 those words were unnecessary?

19 MS. DURIE: Objection, argumentative.

20 A. I decided that they were -- I have the  
21 words "with permission" here --

22 Q. What --

23 MS. DURIE: Wait, wait. Let him finish  
24 answering.

25 Go ahead.

1 Poret

2 A. The answer is I put -- I put "with  
3 permission" in as I thought would be the best way  
4 to be clear and yet not overly leading.

5 Q. Oh, so you think if you added the term  
6 "without permission" that would be leading?

7 A. I didn't say --

8 Q. I'm trying to understand what you're  
9 saying. Are you saying that if the words "without  
10 permission" were added it would become leading?

11 A. Not necessarily, but it could be.

12 Q. All right. Let's get to the next  
13 sentence, which you say makes it all fine. You  
14 say, For some other books the full book or longer  
15 portions of the book are viewable in response to  
16 search Google Books with special permission from  
17 the publisher or author. Our questions are not  
18 about the display of full books or longer  
19 portions.

20 Why did you use the word "special"?

21 A. Well, just to highlight that we're  
22 talking about an instance where Google has  
23 affirmatively gone to the author or the publisher  
24 and gotten permission.

25 Q. What was special about it?

1 Poret

2 A. Well, in other words, that it's a  
3 specific effort to have gotten permission for that  
4 specific book.

5 Q. Why didn't you just say "with  
6 permission"?

7 A. I think that would have been fine too.

8 Q. Yeah, well, don't you think the  
9 juxtaposition of these two paragraphs actually,  
10 contrary to your view, conveys the impression that  
11 the original scanning is with permission and that  
12 the secondary, for other books, is with special  
13 permission?

14 A. No.

15 Q. You don't think so?

16 A. No. I think that's completely  
17 illogical.

18 Q. You don't think that that is a  
19 reading -- a possible reading for somebody who's  
20 over 80-years-old?

21 A. I don't. I don't think that hearing  
22 that and then hearing a question as it was worded,  
23 I don't think it's possible that somebody  
24 interpreted a question to be asking do you approve  
25 of something or do you object to something that

1 Poret

2 receiving statutory damages for Google's scanning  
3 of books without permission of the author or  
4 publisher?

5 A. No.

6 Q. Is there a particular reason you didn't  
7 ask that question?

8 A. It never would have occurred to me to  
9 ask something like that.

10 Q. Because you didn't want to know the  
11 answer; right?

12 MS. DURIE: Objection, argumentative.

13 A. No.

14 Q. Well, if you want to know about whether  
15 people want to participate in a lawsuit, don't you  
16 have to talk to them about the remedies that they  
17 might get if they won?

18 A. I don't know. That's not quite how I  
19 conceive of the survey.

20 Q. Okay. So this survey is not intended  
21 to determine whether or not authors want to  
22 participate in this lawsuit, is it?

23 A. I don't know that I'd put it exactly  
24 that way. I'd say it's more whether -- one of the  
25 purposes would be whether the lawsuit is

1 Poret

2 consistent with the interests or desires of a  
3 significant portion of authors who might be in the  
4 class. I don't know whether you'd call that  
5 whether they want to participate or not.

6 Q. But you would agree that the way the  
7 questions are worded here does not really -- is  
8 not a fair determination of whether any of these  
9 authors want to participate in this lawsuit;  
10 right?

11 A. I do -- I do think it's fair. I think  
12 the fair way to find out is asking their opinion  
13 on the substantive topic, not saying to them, hey,  
14 If we pay you enough money, would you, you know,  
15 change your mind about this. That's what a survey  
16 is not supposed to do.

17 Q. Oh, so you think it's fair to leave out  
18 the fact that Google's scanning books without  
19 permission and that they have a right to damages  
20 for that --

21 MS. DURIE: Object.

22 Q. -- and that that somehow would give you  
23 some insight into whether they would want to  
24 participate in a lawsuit?

25 MS. DURIE: Objection, argumentative,

1 Poret

2 lacks foundation, mischaracterizes the  
3 witness's testimony.

4 A. That's not what the survey did.

5 Q. In the survey from point 220 and the  
6 next couple of pages, the phrase "short excerpts"  
7 is repeated about eight times. Was that  
8 intentional on your part?

9 A. I don't know that eight was  
10 intentional, but it was intentional to try to make  
11 sure that they understand the distinction between  
12 the two categories that we're talking about and  
13 that they're answering about the right one.

14 Q. Do you think that someone who has never  
15 been on Google would understand from this prose  
16 what this all means?

17 A. I don't know how to answer that across  
18 the board, but I know that I looked at the results  
19 of the survey and they were consistent among  
20 people who said they were very familiar with  
21 Google Books versus those who aren't. So I don't  
22 think that was a factor in the results.

23 Q. How many people did you attempt to  
24 reach in the survey? How many phone calls were  
25 made?

1 Poret

2 A. I don't know, but the whole intent of  
3 that previous description that we gave people was  
4 that we're not talking about an extended section  
5 of a book, that we're talking about the several-  
6 sentence, eighth-of-a-page snippets surrounding a  
7 search term.

8 So the intent is by this point, having  
9 heard our description a couple of times, we have  
10 defined for them what the short excerpt means and  
11 that they should now understand that.

12 Q. Do you know if anybody asked them -- is  
13 there some reason why you didn't say something  
14 specific like Google has a program called the  
15 partner program. Books are available by  
16 permission for preview of up to 10 percent or 20  
17 percent of the book. These are not the type of  
18 short excerpts that we're talking about in this  
19 survey.

20 A. That is what I feel we did in the  
21 previous section, just not the way you stated it.

22 Q. Not as clear?

23 A. No, not -- no, I don't agree with that.

24 Q. It says, followed by we'd like to know  
25 the extent to which you approve of or object to

1 Poret

2 Google scanning your copyrighted books so that  
3 they can be searched online and short excerpts  
4 delayed in search results.

5 What's the use -- why are you asking  
6 them about the "so that"?

7 A. Because that is what the -- that's what  
8 the survey is about. It's Google making short  
9 excerpts of their books available in search  
10 results.

11 Q. You don't think this conveys an  
12 impression that that's the reason why Google scans  
13 the books?

14 A. Well, that -- yes, I do think it partly  
15 conveys that that's the reason. That's what we're  
16 asking about. Assuming somebody is not giving  
17 permission, the question is do they approve of  
18 Google doing this so that they're -- so that these  
19 results can be displayed like this, that that  
20 is -- that is a purpose of what Google's doing,  
21 and it's the purpose that's relevant to the  
22 survey.

23 Q. So am I to glean from your last answer  
24 that you were trying to determine whether or not  
25 people, respondents, objected or not to Google

1 Poret

2 scanning without permission?

3 A. Yes, for the specific purpose of  
4 showing these excerpts, short excerpts.

5 Q. Right. So you want to know whether or  
6 not the respondents object, but you don't include  
7 the words "without permission" --

8 A. Yes.

9 Q. -- here, just like you didn't include  
10 it in the description?

11 A. We've already talked about how I feel  
12 it was included in the description. But yes, I  
13 agree it's not repeated in this question.

14 Q. Now, there's no choice here of no  
15 opinion or not enough information. Is there some  
16 reason why those are not choices?

17 A. Well, neither approve nor object is --

18 Q. That could mean they're neutral. That  
19 doesn't necessarily mean they have no opinion,  
20 does it?

21 A. Well, if someone has no opinion, then  
22 they neither approve nor object.

23 Q. So you believe that the phrase "neither  
24 approve nor object" is exactly the same as an  
25 option of no opinion?

1 Poret

2 A. I believe it encompasses it.

3 Q. You do?

4 A. Yes.

5 Q. And what about the option of I don't  
6 have enough information to answer, or need more  
7 information?

8 A. If some -- well, that -- I never -- I  
9 never heard that anybody gave an answer like that.  
10 And if that was -- that's the type of thing that  
11 if people were giving a response like that, I  
12 would have been told and asked about that. So I  
13 don't think that was an issue.

14 Q. That wasn't an option given to them;  
15 correct?

16 A. That wasn't an option on the scale, but  
17 people can obviously say what they want on the  
18 phone, at least. And when people say things like  
19 that in the initial phase of a survey, that comes  
20 back to me when we talk about it. And we  
21 sometimes make little tweaks.

22 But I never heard anything about  
23 anybody giving a response like that.

24 Q. And you didn't think that it was  
25 appropriate to have that as one of the options?

1 Poret

2 A. I'm not saying it's inappropriate; I'm  
3 saying the way I did it I think is appropriate.

4 Q. Now, you've mentioned this survey was  
5 limited to the snippets. You're aware that Google  
6 scanned entire books and gave copies of the entire  
7 scans to libraries; right?

8 A. Yes.

9 Q. Were you specifically instructed not to  
10 ask any questions about that?

11 A. No.

12 Q. You just didn't?

13 A. Nobody said to me don't ask questions  
14 about that, but that was not a subject that was  
15 brought up as a purpose of the research.

16 Q. On the top of page 9 it says, The order  
17 in which "object" came before "approved" was  
18 randomized in both the question text and in the  
19 order of the response option, so that half of  
20 respondents were always presented with "approved"  
21 first and half presented with "object" first.

22 That's done by the computer. Even  
23 though you have a lot of nonrespondents, you can  
24 make sure that half and half of the actual  
25 respondents had this different order?

1 Poret

2 A. Yes.

3 Q. How do you do that?

4 A. Well, there's two ways it can be done  
5 technologically. It can either be that every time  
6 you get to this question it literally picks a  
7 random number that determines this, or it can be  
8 that every other respondent gets a different -- a  
9 different order. I'm pretty sure it was the  
10 former option, technologically that it simply  
11 randomized.

12 Q. It randomized only for those actually  
13 responding?

14 A. Yes, because it's literally happening  
15 as you're getting to that point of the  
16 questionnaire.

17 Q. I see.

18 Now, going back to -- on page 9 there's  
19 this question: Which of the following best  
20 represents your opinion how, if at all, you have  
21 been financially impacted by Google scanning your  
22 copyrighted books so that they can be searched  
23 online and short excerpts displayed in search  
24 results?

25 And there's three choices: I feel I

1 Poret

2 have financially benefited, I feel I have been  
3 financially harmed, I feel I have not been  
4 financially impacted one way or the other.

5 Again, why is there no choice of I  
6 don't have current information to answer this  
7 question?

8 A. It's the same answer before.

9 Q. Well, meaning what?

10 A. The person either has a perception that  
11 they've been harmed or that they've benefited or  
12 they don't. They don't -- they don't need  
13 information to answer that question.

14 Q. So this is only designed to elicit  
15 perceptions, not actual facts; right?

16 A. Well, I don't think the line between  
17 perception and fact is that is all that clear.  
18 It's certainly intended to get at facts, but of  
19 course you necessarily are dealing with somebody's  
20 perception of what the facts are.

21 Q. You could have designed a survey to  
22 say, I have been financially benefited; and then  
23 the next question would be why; and then they  
24 would give a verbal response; right?

25 A. Well, that is -- that is how it -- that

1 Poret

2 is what happens in this survey.

3 Q. The question was I feel I have been.  
4 You didn't ask whether they had been; you asked  
5 whether I feel I have financially benefited. It's  
6 a different question than I have financially  
7 benefited; correct?

8 A. It's different wording. But what I was  
9 saying is that the other piece of what you said  
10 does happen, which is if they give one of these  
11 answers they are asked about that.

12 Q. Right. But is there a particular  
13 reason why you included the "feel" part of the  
14 question?

15 A. Yes, because I don't expect that  
16 somebody on the phone is going to -- is going to  
17 know for sure how this has affected them. In  
18 other words, I don't know that an author always  
19 would have the ability to quantify somehow whether  
20 this has financially benefited them or not.

21 So it is phrasing it in a way that is  
22 intended to convey we want to know your opinion  
23 about this. You don't have to necessarily have  
24 plotted this out with an accountant and figured it  
25 out.

1 Poret

2 But that doesn't mean we're not  
3 interested in fact. We're interested in their  
4 perception of what the facts are.

5 Q. Let's go back to page 7, going back to  
6 this description that you read to all the  
7 respondents or that they read themselves online if  
8 they responded to the e-mail version. There's a  
9 sentence that says, A user can also click on a  
10 link to find a book in a bookstore or library.

11 Is there a particular reason you put  
12 that in there, that text?

13 A. Yes.

14 Q. What was the reason?

15 A. That that is an accurate description of  
16 what happens that I think would be relevant to  
17 some people's opinions.

18 Q. Have you ever clicked on any of those  
19 links?

20 A. I did, in some of my searches, see that  
21 there were in fact links to buy books. I can't  
22 remember if I clicked on any of those links.

23 Q. Well, if you click on a link for some  
24 of the books and -- you didn't click on any of  
25 them, so you don't know what happens when you

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2 click?

3 A. I don't remember if I clicked on links  
4 for buying books.

5 Q. Did you get any information from Google  
6 about whether or not they know whether or not  
7 those clicks result in any sales of books?

8 A. I do not have any information about  
9 that.

10 Q. One way or the other?

11 A. Right.

12 Q. Did you ask them that question?

13 A. No.

14 Q. So in all of these questions you're  
15 always asking about feelings, which for the reason  
16 you've already testified? Is that the reason?

17 A. Again, that's -- I wouldn't quite put  
18 it that we're asking about feelings. I'd put it  
19 that we're asking about attitudes in one instance  
20 and perceptions of impact on them in the other.

21 Q. Every question has the word "feel";  
22 right?

23 A. Not every question. The questions that  
24 we are talking about.

25 Q. These questions about financial impact

1 Poret

2 and demand, et cetera, they all ask about "feel,"  
3 feelings; correct?

4 A. No. They have the word "feel" in it.

5 Q. You don't think that means it's a  
6 question about how you feel?

7 A. I think the word "feel" is intended to  
8 convey we're not asking for quantitative backup of  
9 this; we're asking for your opinion.

10 Q. For a seat-of-the-pants answer when  
11 they get called up by somebody randomly at, you  
12 know, 8 o'clock at night?

13 MS. DURIE: Objection.

14 Q. Is that what it's intended to get?

15 A. No, it's just like saying I think -- I  
16 think I've benefited or I feel I've benefited or  
17 it's conveying that we're asking for an opinion,  
18 not something quantitative.

19 Q. Okay. So now go to page 12. We have  
20 these questions about do they feel they were  
21 financially impacted, do they feel they were  
22 financially benefited, et cetera, do they feel  
23 demand has improved or not; right? That's the way  
24 they're all phrased; right?

25 A. You just said a bunch of things. I

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2 typical response rates for a population like this.

3 Q. "Like this" meaning what?

4 A. Meaning not just an ordinary consumer  
5 but -- I don't know if you would say more  
6 sophisticated or professional, but a typically  
7 higher educated, more sophisticated -- the other  
8 thing is that 3 percent number that you came up  
9 with is just an arbitrary number because, until we  
10 find out, it might be that a thousand of the  
11 e-mail addresses were just invalid addresses.

12 It's not as if that means that  
13 everybody who didn't respond looked at this and  
14 chose not to responsible. It could be that most  
15 of them never even saw it.

16 Q. Right. But let's just back up and talk  
17 about your sample to begin with was just this Gale  
18 database; right?

19 A. Yes.

20 Q. And that's not -- that was just  
21 given -- you were told to use that by Google;  
22 right?

23 MS. DURIE: Objection, asked and  
24 answered, mischaracterizes.

25 Q. By Google's counsel?

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2 MS. DURIE: Mischaracterizes the  
3 witness's testimony.

4 Q. That's what happened; right?

5 A. No, I wouldn't put it that way.

6 Q. They provided it to you?

7 A. Yes.

8 Q. Did you make any determination about  
9 whether that was an over-inclusive or under-  
10 inclusive list with respect to your target  
11 population?

12 A. Yes, I thought about that. My sense is  
13 it might have been over inclusive in that it might  
14 contain authors who don't end up meeting a class  
15 definition. But that is not a problem because we  
16 can just find out from them if they meet the class  
17 definition. And then if they don't, those people  
18 could always be put aside in the analysis.

19 And could it be under inclusive? By  
20 some degree it could be. You can never have a  
21 list that actually has managed to get everybody in  
22 an industry. So I'm sure that there are some  
23 authors that Gale didn't manage to get on the list  
24 for one reason or another.

25 But my understanding is it's a fairly

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2 comprehensive list. If it was missing some  
3 authors, it wouldn't be enough to undermine its  
4 validity for use in a study like this.

5 Q. So you said it might be over inclusive  
6 because it includes authors that aren't in the  
7 class; right?

8 A. Yes.

9 Q. And then you said but you could adjust  
10 for that by determining who was in the class and  
11 figuring out, as to those, what their responses  
12 were; right?

13 A. What I meant was if you wanted to you  
14 could just take anybody who, based on their  
15 answers, does not appear to be in the class and  
16 put them aside and just look at the data of the  
17 people who are in the class.

18 Q. And how could you determine by your  
19 survey who was and who wasn't in the class?

20 A. One thing you could do is determine  
21 which people said yes to -- yes, that there was a  
22 copyright registration filed within three months  
23 versus the people who said no. So those are some  
24 people -- that would identify some people who were  
25 not members of the class.

1 Poret

2 information about these 550 that you just  
3 mentioned who said their copyright was filed;  
4 right?

5 A. The reason is that I looked at it and  
6 the results are so similar to the overall group  
7 that it didn't seem -- it didn't strike me as  
8 putting in a section about that.

9 Q. You've put in other tables where you  
10 said the results were consistent?

11 A. Right.

12 Q. Referring you to page 19 of your  
13 report. I'm sorry, I lost my train of thought.  
14 Before you do that, you said the report -- I mean  
15 your sample could have been under inclusive;  
16 right? We talked about over inclusive. You said  
17 it also could have been under inclusive.

18 I mean, it was by definition under  
19 inclusive, wasn't it? This Gale list could not  
20 possibly be a list of all the authors whose books  
21 have been copied in Google Books, could it?

22 A. I don't know. Every single list that  
23 any survey has ever been done from could be called  
24 under inclusive, depending on how you look at it.  
25 The question is Gale maintains a reference work

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2 that is designed to have as many authors on it as  
3 they -- as they can manage to keep track of.

4 I'm saying I'm sure it couldn't  
5 possibly be a hundred percent of authors at all  
6 times, but as a reputable company that maintains  
7 databases like that I think if it's under  
8 inclusive it's not by a concerning amount.

9 Q. Nobody is faulting Gale for their  
10 database. What I'm asking you about is as the  
11 creator of a survey you -- one of the issues that  
12 you have to consider is whether the sample was  
13 under inclusive or not; right?

14 A. Yes.

15 Q. Because a sample is not necessarily a  
16 fair sample if it's grossly under inclusive;  
17 right?

18 A. That may or may not be true.

19 Q. It may or may not be true.

20 So you could have a sample that was --  
21 did you do any kind of testing of this sample to  
22 determine that it is representative of all authors  
23 in the United States, of the Gale data?

24 A. The only people who were called were  
25 from this database, so I have no way to compare

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2 that to anybody who isn't in the database. But my  
3 understanding is that this database is a reliable  
4 source, that if it's under inclusive it's not --  
5 it's not by much. It's not going to be missing  
6 enough of a universe to undermine the results.

7 Q. Where did you get that information,  
8 that it was -- that it's not grossly under  
9 inclusive?

10 A. Well, in look -- in digging around,  
11 that seemed to be the best -- the best available  
12 source, and the number of authors it has on it is  
13 really large.

14 And based on everything that we  
15 discussed at the time, I don't have any reason to  
16 believe that there's 2 million authors in the U.S.  
17 with published books, and yet this only has  
18 142,000. I don't know what the numbers are  
19 exactly. But I think this is -- it's a sizeable  
20 list.

21 Q. Well, it may be that there is no list  
22 that has every author on it. But to say that it's  
23 the best list you could find does not mean that it  
24 isn't grossly under inclusive, does it?

25 A. No, that in and of itself doesn't mean

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2 that. But that it has something approaching  
3 150,000 authors seems pretty robust.

4 Q. 142,000 authors, you said, but you only  
5 had contact information for about a third; right?

6 A. That may be about right, but we looked  
7 for contact information for others.

8 Q. And you can't tell me, then, what the  
9 total number you found contact information was;  
10 right?

11 A. No, I can. The report discusses that  
12 we had a sub sample to deal with this very issue  
13 of people who were on the list but had no contact  
14 information. And we found contact information for  
15 a lot of other people on the list so that we could  
16 get through to a sample of people who had no  
17 contact information and confirm that the results  
18 among them were basically consistent with the  
19 results among everybody else.

20 Q. Yeah, you have 119 people that you said  
21 you had no contact information for from Gale that  
22 you somehow got contact information for, and they  
23 responded to the survey; correct?

24 A. Yes.

25 Q. But you don't tell me how -- you don't

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2 say how many others without contact information  
3 you got contact information for and they didn't  
4 respond?

5 A. Well, this is the issue we've already  
6 talked about. It has nothing to do with whether  
7 they had contact information or not.

8 Q. Right. So one of the issues is of the  
9 142,000, which is already grossly under inclusive,  
10 how many did you ultimately get contact  
11 information for. And we don't know the answer to  
12 that question as we sit here; right?

13 A. Right.

14 Q. So it could have been -- do you have  
15 any idea of what possible number it was?

16 MS. DURIE: Calls for speculation.

17 A. I said I'd find out for you.

18 Q. So then from an already grossly under-  
19 inclusive starting point of 142,000, we're down to  
20 a yet more grossly under inclusive of probably  
21 less than 50,000 people that were contacted;  
22 right?

23 MS. DURIE: Objection. It's  
24 argumentative, it lacks foundation, and it  
25 mischaracterizes the witness's testimony.

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2 A. First of all, I never agreed that  
3 142,000 is grossly under inclusive. And what  
4 you're talking about now I also don't think is so  
5 much an issue of under inclusiveness.

6 Q. When you did your analysis of the data,  
7 did you notice that there weren't too many young  
8 authors?

9 A. Yes.

10 Q. You don't think that affects the  
11 results?

12 A. Well, I did -- I did look at the  
13 results by age, and my assessment of that is that  
14 the results were very similar across all the age  
15 groups, at least through the forties, fifties,  
16 sixties, seventies. Below that I don't feel like  
17 I had enough respondents to really look at those  
18 individually.

19 But my sense is that from looking at  
20 the data across ages that the results were fairly  
21 consistent and that even if you wanted to  
22 re-weight the numbers to reflect a different age  
23 distribution that the numbers weren't going to  
24 change by more than a percentage point or two here  
25 and there.

1 Poret

2 Q. I'm trying to find the results by  
3 age -- oh, here it is, page 19. You say -- you  
4 have your chart at the top, and then you say,  
5 While the set of authors surveyed more heavily  
6 represents older authors, the survey results were  
7 reasonably consistent among authors of various  
8 ages.

9 What do you mean by "reasonably  
10 consistent"?

11 A. Within a couple of percentage points,  
12 nothing that would result in a different  
13 conclusion.

14 Q. So then you have your chart which has  
15 authors divided up by under 60, 112; 60 to 69,  
16 166; 70 and older, 537.

17 So that doesn't seem to be -- what  
18 happened to the 50 to 59, 40 to 49, 30 to 39  
19 categories? You didn't think you should set those  
20 out?

21 A. Obviously we're getting to a smaller  
22 sample size at that point, so I figured grouping  
23 those together into under 60 made sense. But you  
24 could break it out into 50 to 59, and you could  
25 look at 40 to 49; and I did. And the results

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among those groups are similar.

Q. So do you know how many respondents  
were age 20 to 29?

A. None.

Q. How many 30 to 39?

A. Yeah, I think there were four.

Q. Right. And how many 40 to 49?

A. I think it was something between 25 and  
30.

Q. Yeah, 25, does that sound right?

A. I said 25 to 30 so...

Q. And 50 to 59, do you know how many?

A. I'd say, you know, 80 to 90.

Q. I counted 80, but that could be off.  
You didn't really have a heck of a lot  
of younger respondents?

A. I agree with that.

Q. And yet people in their twenties,  
thirties, forties, do write books; right?

A. Yes.

Q. In fact, they're the ones that are  
probably writing books that are in print; right?

A. Well, that -- that did occur to me, and  
that does seem to make sense. And that's part of

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2 the reason that I looked at the results between  
3 people who have books in print and people whose  
4 books are not in print and saw that whether books  
5 are in print or not really wasn't making much of a  
6 difference in the results. So I don't think that  
7 that would be a basis for young people to have  
8 different responses.

9 The other thing that was at work in my  
10 consideration as this was going on was that my  
11 understanding is the class representatives were in  
12 their seventies or older, and they're purporting  
13 to represent the interests of a class.

14 So it doesn't seem inappropriate that  
15 the survey respondents tended to be toward the age  
16 range of the class representatives. And if  
17 somebody thinks that 20-year-olds -- people in  
18 their twenties and thirties are just categorically  
19 different interests than people in their sixties  
20 and seventies, then that's --

21 Q. I'm not asking what people think; I'm  
22 asking whether you think the survey was under  
23 inclusive or not.

24 A. That's what I'm telling you, though.  
25 The only reason somebody would worry about a

1 Poret

2 survey being under inclusive is if you were  
3 thinking, all right, we're missing a group of  
4 people that might be categorically different.  
5 They might have different issues. They might have  
6 different interests.

7 And if you believe that, you know, by  
8 definition this class -- those people couldn't be  
9 part of this class anyway. So that's why it does  
10 not seem to me to be an issue of under  
11 inclusiveness.

12 Q. So your role here is as the designer of  
13 a survey; right?

14 A. Yes.

15 Q. You seem to be sort of crossing over  
16 into opining about what's appropriate in a class  
17 action setting.

18 A. No, I'm just -- I'm just saying that by  
19 definition when you raise an issue of should we,  
20 in a survey, be overly concerned that we're  
21 missing a group of people, the only reason you  
22 would be concerned is if you're thinking that  
23 group of people might be essentially a different  
24 class of people than the ones we reached, who have  
25 different answers and different interests.

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2 And that does not strike me as  
3 problematic in and of itself when the whole basis  
4 of -- or a big part of the basis of what we're  
5 testing is do the people -- do authors have  
6 interests that are consistent across this class  
7 with the class leaders.

8 Q. You had 32 respondents who were over  
9 90; right? You're aware of that?

10 A. I'm actually not sure at the top, but  
11 I'll take your word for it.

12 Q. Well, approximately 32. You don't  
13 think they might be a little less familiar with  
14 the Internet than people in their twenties,  
15 thirties, and forties?

16 A. No, they very well might be.

17 Q. Is that of any relevance?

18 A. First of all, 32 people are not going  
19 to affect the results one way or the other, but  
20 across the survey and across the different ages  
21 the survey should be accounting for different  
22 levels of familiarity that different people have.

23 Q. That assumes that it was properly  
24 constructed in the first place; right?

25 A. I don't know.

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2 Q. The survey can only be extrapolated if  
3 it was properly designed; right? It's not ipso  
4 facto that just because you do a survey you can  
5 say that the results can be extrapolated from one  
6 population to another; right?

7 A. It's hard to tell what you're asking.  
8 I basically agree with the idea that a survey  
9 should be properly designed for -- to make use of  
10 the results.

11 Q. An do you know what use of the results  
12 Google is making of your survey?

13 A. Not -- I know that this report has been  
14 submitted. I don't know how to characterize what  
15 attorneys or Google are doing with it.

16 Q. Well, all the percentages in your  
17 report are based on all the authors sampled,  
18 whether or not they're books were actually scanned  
19 and Googled in Google's library project; right?

20 A. I think there are tables in the report  
21 that break down people who -- that talk about  
22 people who said that their books are available on  
23 Google Books in short excerpts and those who  
24 didn't or weren't sure. That issue is to some  
25 extent addressed.

1 Poret

2 Q. But you never got a list from Google of  
3 the books that they actually scanned so that you  
4 could be sure that those particular books were the  
5 ones that were the subject of your survey?

6 A. I didn't get any kind of list from  
7 Google.

8 Q. On page 16 of your report, Footnote  
9 5 --

10 A. Okay.

11 Q. -- it says, Out of the total 880  
12 respondents, 1 indicated that they or someone in  
13 their household works for Google, 16 indicated  
14 they or someone in their household works for the  
15 U.S. government, and 5 indicated that they or  
16 someone in their household works for either a  
17 local, state, or federal court. Removing these  
18 respondents would not change the survey findings.

19 Right, you say that?

20 A. Yes.

21 Q. I can do simple math, and I added these  
22 up. You're talking about 22 respondents; right?

23 A. Yes.

24 Q. 22 out of 880 you're saying is not  
25 statistically significant? Is that what you're

1 Poret

2 which is the point of a pilot or pretest.

3 But I did not see anything that seemed  
4 problematic that was going to require any changes,  
5 so I sort of just rolled on. But I would consider  
6 the first phase of it essentially a pilot.

7 Q. So when you say "the first phase," the  
8 first how many surveys?

9 A. I don't -- I don't remember. I think  
10 that we could tell that from -- I know that they  
11 e-mailed me a data file, so -- which I'm sure from  
12 that I could tell what sample size I first was  
13 looking at.

14 Q. So you looked at the first whatever  
15 number of it was surveys, and you didn't make any  
16 changes; right?

17 A. Right.

18 Q. Are there any such things as generally  
19 accepted survey principles?

20 A. Yes.

21 Q. Where can one find them?

22 A. I don't think one can find them in any  
23 one place written down. I think, like a lot of  
24 fields, there's -- general principles come from a  
25 lot of different sources and from a lot of

1 Poret

2 experience.

3 Q. So there's nowhere written down  
4 anywhere a list of generally accepted survey  
5 principles?

6 A. There are plenty of places that have  
7 things, like the reference guide, that have some  
8 general principles. But there's no single place  
9 that I would point to. And I wouldn't even say  
10 that these general -- I wouldn't say that any  
11 particular source is the authoritative guide on  
12 anything.

13 Q. But yet there are generally accepted  
14 survey principles?

15 A. Yes, I think that's fair to say.

16 Q. And have you ever criticized someone  
17 else's survey?

18 A. Yes.

19 Q. And when you criticize someone else's  
20 survey, it's because you believe they haven't  
21 followed certain survey principles, sometimes?

22 A. I don't know that I think about it in  
23 the abstract like that. I look at their survey  
24 and review it. And if I think there are serious  
25 flaws in it, I would point them out.

1 Poret

2 Q. What type of flaws have you found in  
3 other people's surveys?

4 A. That there were flaws in the universe,  
5 that the questions were poorly done for one reason  
6 or the other, that data was analyzed incorrectly.  
7 Those are the examples that come to mind.

8 Q. So "flaws in the universe," you mean  
9 flaws in the universe that was sampled? What do  
10 you mean by "flaws in the universe"?

11 A. That the people who were interviewed  
12 were not really the right people.

13 Q. You ever criticized a survey for being  
14 over or under inclusive?

15 A. I've certainly criticized a survey for  
16 being over inclusive. I'm not sure I have for  
17 being under inclusive.

18 Q. Is that because you think over  
19 inclusiveness is more problematic?

20 A. Not necessarily, but in those -- in the  
21 instances where I've done that, there's been the  
22 possibility that the majority of the people in the  
23 survey didn't actually belong in the survey; and  
24 those people who didn't belong, that there's  
25 reason to think that they were not even

1 Poret

2 appropriate test subjects and their answers could  
3 be -- could make no sense for that survey.

4 Q. When you've criticized a survey for  
5 having questions that were poorly done, in what  
6 ways from a survey's -- surveyor's perspective  
7 would a question be poorly done?

8 A. It's almost impossible to answer  
9 questions like this in the abstract. Questions  
10 could be worded in a way that they're misleading  
11 or that they're not understood. They could be  
12 leading and suggestive. They could be irrelevant.

13 Q. Anything else?

14 A. I think that covers it.

15 Q. In cases where you found other  
16 surveyors to have data -- analyzed data  
17 incorrectly, what type of mistakes do people make?

18 A. Typically that answers are being  
19 classified to mean one thing when they don't  
20 really mean that.

21 Q. Anything else?

22 A. That's all I can think of.

23 Q. Are there any such thing as generally  
24 accepted statistical methods for surveyors?

25 A. Yes.

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2 Q. Can you find them somewhere in writing?

3 A. You could find textbooks and you could  
4 find articles, but there's no source that I would  
5 point you to.

6 Q. Well, when you criticize -- have you  
7 ever criticized another surveyor because of their  
8 statistical methods?

9 A. I don't think so.

10 Q. Do you still have PX 76?

11 A. Yes.

12 Q. On the numbered page 262?

13 A. Okay.

14 Q. About the middle of the page there. It  
15 says, The report submitted by a survey expert who  
16 conducts a telephone survey shall specify, one,  
17 the procedures that were used to identify  
18 potential respondents; two, the number of  
19 telephone numbers for which no contact was made;  
20 and three, the number of contacted potential  
21 respondents who refused to participate in the  
22 survey.

23 Do you agree or disagree with that?

24 A. I don't agree that that is an automatic  
25 rule.

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2 Q. So that's not part of generally  
3 accepted survey principles, in your view?

4 A. No.

5 Q. Do you sometimes include that  
6 information in your report?

7 A. I don't think I ever have.

8 Q. You never have?

9 A. I don't believe so.

10 Q. Have you seen other people who do  
11 include it?

12 A. I've seen it included. I've seen far  
13 more that do not include it, though.

14 Q. Referring you to page 245?

15 A. Okay.

16 Q. The second paragraph says, One  
17 suggested formula for quantifying a tolerable  
18 level of nonresponse in a probability sample is  
19 based on the guidelines for statistical surveys  
20 issued by the former U.S. Office of Statistical  
21 Standards.

22 Have you seen those guidelines?

23 A. No.

24 Q. You've never seen them?

25 A. No.

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2 Q. You've read PX 76 before; right?

3 A. Yes.

4 Q. And you've seen that this exists;  
5 right?

6 A. Well, first of all, nobody thinks that  
7 any of this makes any sense, including  
8 Dr. Diamond, and she's rewriting all of this.

9 Q. My question is have you seen the U.S.  
10 Office of Statistical Standards, and my question  
11 is you've seen that it existed -- right? -- these  
12 guidelines.

13 A. I've read this document. I have not --

14 Q. You never looked at them to see what  
15 they said?

16 A. I have not, for the reason that I just  
17 said to you, which is this is way out of touch  
18 with the reality of the market research industry.  
19 And Dr. Diamond does not stand behind any of this.

20 Q. You're talking about the rest of the  
21 paragraph. I'm talking about the fact that  
22 there's some guidelines for statistical surveys  
23 issued by the former U.S. Office of Statistical  
24 Standards. It's a document that exists; right?

25 A. It may exist, but this whole section is

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2 reporting numbers from that document, which is why  
3 I haven't looked at the document, because she's  
4 explicitly discussing the numbers that are in that  
5 document.

6 Q. Do you know if that document has other  
7 information in it?

8 A. I'd imagine it does.

9 Q. But you never thought to look at it?

10 A. No.

11 Q. The next portion of this paragraph  
12 says, According to these guidelines, response  
13 rates of 90 percent or more reliable, et cetera,  
14 and then it goes down. It says, If the response  
15 rate drops below 50 percent, the survey should be  
16 regarded with significant caution as a basis for  
17 precise quantitative statements about the  
18 population from which the sample was drawn.

19 You don't agree with that, I take it?

20 A. Well, I don't -- I don't agree with the  
21 number 50 percent. And I know she's rewriting  
22 this section, because no survey would ever come  
23 close to that anymore.

24 I do agree with the issue of caution  
25 about precise quantitative statements. But

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2 when -- in a survey like this, it's -- to me  
3 whether 14 percent is the exact number or it's  
4 really 16 percent or 12 percent is not -- is not  
5 as important.

6 In other words, to me whether  
7 something's 14 percent as a precise quantitative  
8 statement is not so much the point. The point is  
9 more -- it is obviously relevant, but the grander  
10 conclusion is that there's a dramatic pattern of  
11 people favoring -- saying they approve of  
12 something as opposed to objecting to it. A  
13 response -- a low response rate does not call that  
14 into question at all.

15 Q. You don't like her numbers here, but  
16 there's no number that you would substitute and  
17 agree with, like if the response rate drops below  
18 X percent the survey should be regarded with  
19 significant caution?

20 A. I don't know what number I would put on  
21 that, but I would tell you that no survey getting  
22 a 20 percent rate is miraculous with a survey  
23 these days. The standards for response rates have  
24 changed dramatically with the way the world has  
25 changed.

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2 And I know that -- well, at least from  
3 what I've been told, the next version of this  
4 reference guide is dramatically changing this  
5 section to reflect what the standards are in the  
6 industry.

7 Q. Is that because nobody responds to  
8 surveys?

9 A. It's not because nobody responds; it's  
10 because there are heightened security and privacy  
11 concerns, and it's not like it used to be where  
12 people could walk up -- go door to door doing  
13 surveys. It's harder and harder to reach people.

14 Q. So because it's harder and harder to  
15 reach people, somehow the standards for  
16 reliability drop?

17 A. Yes. The only -- the standards -- the  
18 only standards one can have are what is standard  
19 in your field. And standard response rates are in  
20 the 10 to 20 percent range now. And something  
21 that's going to be used as evidence can't be  
22 expected to do anything but comply with accepted  
23 standards within its field.

24 Q. Assuming the courts accept standards  
25 that are lowered; correct?

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2 MS. DURIE: That calls for speculation  
3 and legal conclusion.

4 A. I don't think that's right. I think  
5 it's fairly clear that the rules for courts are  
6 that some -- that scientific evidence has to  
7 satisfy the standards that are accepted within the  
8 relevant field. And these surveys are accepted  
9 within the field of market research.

10 And companies are spending billions and  
11 billions of dollars on surveys with response rates  
12 below 20 percent and 10 percent to make decisions  
13 of tremendous consequence for them. And that  
14 would not be happening if it wasn't well accepted  
15 that surveys with lower response rates are  
16 reliable.

17 Q. People wouldn't be spending money on  
18 advertising irrationally? Is that your testimony?

19 A. No, I didn't say advertising; I said on  
20 market research. Companies wouldn't be spending  
21 billions of dollars to get information that they  
22 consider obtained through an unreliable method.

23 MS. DURIE: Joanne, I should either  
24 move my flight --

25 MS. ZACK: I told Joe that I was going